

***United States Court of Appeals  
for the Second Circuit***



**SUPPLEMENTAL  
APPENDIX**



# 76-6070 76-6080

---

In The  
**United States Court of Appeals**  
For the Second Circuit

B

JOSEPH C. WEBER, INC.,  
*Plaintiff-Appellee-Cross-Appellant,*

v.

UNITED STATES OF AMERICA,  
*Defendant-Appellant-Cross-Appellee.*

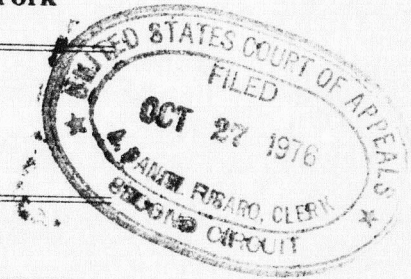
---

On Appeals From The Judgment Of The United States  
District Court For The Western District Of New York

---

SUPPLEMENTAL APPENDIX  
(pp. SA273-281)

---



RAICHLE, BANNING, WEISS  
& HALPERN  
*Attorneys for Plaintiff-Appellee-  
Cross-Appellant*  
10 Lafayette Square  
Buffalo, New York 14203  
Telephone: (716) 852-7587

TABLE OF CONTENTS

	Page
Testimony of Francis L. Berger.....	SA273
Plaintiff Ex. 5, p. 3, Form 1120 (Tax Return of Plaintiff for fiscal year ended June 30, 1963).....	SA280
Plaintiff Ex. 6, p. 3, Form 1120 (Tax Return of Plaintiff for fiscal year ended June 30, 1964).....	SA281



SA273

1 F R A N C I S L. B E R G E R (Shimerville Road, Clarence,  
2 New York), a witness called by and in behalf of the plaintiff  
3 in rebuttal, having been first duly sworn, was examined and  
4 testified as follows:

5  
6 DIRECT EXAMINATION BY MR. RAICHLE:

7 Q Mr. Ber er, where do you say you live?

8 A Clarence, New York.

9 Q And what is your occupation, what do you do?

10 A Right now I am retired, sir.

11 Q I see. Were you formerly connected with Mobil?

12 A Yes, from 1941 to 1957.

13 Q About the time I had used the right name. What is the  
14 right name?

15 A Mobil Oil.

16 Q Mobil Oil, and from when to when were you employed by  
17 Mobil Oil?

18 A From 1941 to '57.

19 Q And in what capacity were you serving Mobil Oil?

20 A From about 1949 to 1957 I was what they called the  
21 wholesale representative.

22 Q And where were you located physically?

23 A Our office was at 210 Pearl Street, but my territory  
24 was Western New York which included Erie, Niagara,  
25 Chautauqua Counties.

- 1 Q 210 Pearl Street, Buffalo, New York?
- 2 A Right.
- 3 Q And what did your duties comprehend?
- 4 A Mostly good company, - good relationship, - customer-
- 5 company relationship, call on the customer, call on the
- 6 distributor.
- 7 Q And call on organizations like the Weber - -
- 8 A Weber Oil Company, right.
- 9 Q And I suppose you got to know Mr. Weber?
- 10 A Oh, yes, quite well.
- 11 Q I see, and just a word about the industry in those
- 12 days. Was it highly competitive?
- 13 A Very.
- 14 Q And who were some of your competitors?
- 15 A Esso, Gulf, Texaco. Those were the big ones.
- 16 Q They were operating in the same area, were they?
- 17 A Yes.
- 18 Q And it wasn't like now; it was a buyer's market in those
- 19 days.
- 20 A Yes, it was.
- 21 Q Lots of oil.
- 22 A Plenty.
- 23 Q And the question was to sell it?
- 24 A That is exactly right.
- 25 Q And it was part of your job to go around and keep your



1 customers, the distributors pleased with your service?

2 A Right, with the product.

3 MR. JONES: Your Honor, I am going to object to  
4 the line of questioning unless we can  
5 tie it up to the period that is in the  
6 lawsuit.

7 THE COURT: There is no question before the  
8 witness at present, so next question.

9 MR. RAICHLE: I beg your pardon?

10 THE COURT: Next question.

11  
12 BY MR. RAICHLE:

13 Q Who was Mr. Copolla?

14 A Mr. Colla.

15 Q How do you spell it?

16 A C-o-l-l-a.

17 Q Was he your senior?

18 A He was my immediate senior. He was the district manager.

19 Q And was there a time when you and Mr. Colla, this  
20 gentleman you have just referred to called together on  
21 Mr. Weber?

22 A Oh, yes.

23 Q And was that in the early 50's?

24 A Middle 50's.

25 MR. JONES: I object to this, your Honor.

1 THE COURT:

I will overrule it. It is preliminary and we will have to see where it leads. Overruled. Next question, Mr. Raichle.

4  
5 BY MR. RAICHLE:

6 Q And the three of you had a conversation, did you?

7 A Right.

8 Q Now, I don't want to lead and suggest. Just tell us  
9 about the conversation so far as it related to any  
10 payments made or to be made or being made to Mr. Weber  
11 by Mobil Oil.

12 MR. JONES:

I will object to that on the grounds  
13 of hearsay and also on the grounds of  
14 remoteness, your Honor.

15 MR. RAICHLE:

He was there.

16 THE COURT:

Mr. Raichle, I can rule. The objection is overruled.

18  
19 BY MR. RAICHLE:

20 Q Just give us the conversation, if you will, please.

21 A Well, Mr. Colla decided that he wanted to go down to  
22 see Mr. Weber to ascertain whether Mr. Weber was happy  
23 with the relationship, was he happy with the product,  
24 was he happy with the commission that he was getting and  
25 so on and so we - -



1 THE COURT: Mr. Berger, you met with Mr. Weber?  
2 THE WITNESS: Right.  
3 THE COURT: All right. Mr. Raichle.  
4  
5 BY MR. RAICHLE:  
6 Q Just give us the conversation, the substance of it.  
7 A The substance of it was that Mr. Colla wanted to be  
8 assured in his mind directly from Mr. Weber - -  
9 MR. JONES: Objection.  
10 THE WITNESS: That Mr. Weber was satisfied with  
11 the arrangement.  
12  
13 BY MR. RAICHLE:  
14 Q You can't give the operation of Mr. Colla's mind.  
15 THE COURT: Ladies and gentlemen, whatever was  
16 in Mr. Colla's mind is not our concern,  
17 so just disregard whatever was in his  
18 mind.  
19 MR. RAICHLE: I am trying - -  
20 THE COURT: What we need is the conversation.  
21 Listen to Mr. Raichle's question.  
22 THE WITNESS: Right.  
23  
24 BY MR. RAICHLE:  
25 Q What was said on the subject, if anything; the best you

1 can recall.

2 A. The best I can recall to try and quote was, "Mr. Weber,  
3 are you happy".

4 Q. Was the word "commission" mentioned?

5 A. Yes.

6 Q. And just tell us about that part of the conversation?

7 A. Well, that's what I tried to tell you, "Are you happy  
8 with the commission and are you happy with, in general,  
9 with the association".

10 Q. I see, and was the Mobil Company paying Mr. Weber  
11 individually, a commission?

12 A. Pardon?

13 Q. Was the company - -

14 A. Yes.

15 Q. That is, was Mobil Oil paying Mr. Weber a commission?

16 A. Right.

17 Q. On the sale of Mobil products to the Weber Oil Company,  
18 Inc.?

19 A. Exactly.

20 Q. And over the years, did that arrangement continue?

21 A. Yes.

22 MR. JONES: I will object to that, anything beyond  
23 the witness' familiarity with in 1957.

24 THE COURT: You left in 1957?

25 THE WITNESS: Yes, for the period I was there.



1 THE COURT: You are talking about up until 1957,  
2 is that it?

3 THE WITNESS: That is right.

4 THE COURT: All right.

5 MR. RAICHLE: You may ask.

6  
7 CROSS EXAMINATION BY MR. JONES:

8 Q Was that simply an amount based upon the number of  
9 gallons that the Weber Oil Company purchased from  
10 Mobil?

11 A And any new business, any tank car business, yes.

12 Q That Weber Oil Company purchased from Mobil?

13 A That's right.

14 MR. JONES: Thank you. That is all I have.

15 MR. RAICHLE: That is all.

16 THE COURT: That is all. Thank you, Mr. Berger.

17 THE WITNESS: Thank you.

18 THE COURT: Anything else, Mr. Raichle?

19 MR. RAICHLE: I have no more proof, nothing in the  
20 way of evidence.

21 THE COURT: All right.

22 MR. RAICHLE: I have motions.

23 THE COURT: Very well. Mr. Jones, do you have any  
24 further evidence?

25 MR. JONES: No further evidence, your Honor.



## Schedule H.—SUMMARY OF DEPRECIATION AND AMORTIZATION SCHEDULES

DEPRECIATION	Under Rev. Proc. 62-21	Other	AMORTIZATION
1. Straight line method .....		3,530.07	1. Emergency facilities .....
2. Declining balance method .....			2. Research or experimental .....
3. Sum of the years-digits method .....			3. Exploration and development .....
4. Based on units of production .....			4. Organizational .....
5. Addl. 1st year (Sec. 179) .....			5. Trademark and trade name .....
6. Other methods .....			6. Total amortization claimed .....
7. Total depreciation claimed .....		3,530.07	

## Schedule I.—SPECIAL DEDUCTIONS

1. Partially tax-exempt interest (see Instruction 5) .....

2. Dividends received:

(a) 85 percent of column 2, Schedule C .....

(b) 62.115 percent of column 3, Schedule C .....

(c) 85 percent of dividends received from certain foreign corporations .....

3. Total dividends-received deductions (sum of lines 2(a), (b), and (c) but not to exceed 85 percent of the excess of line 28, page 1 over the sum of lines 1 and 5). (See instructions in case of net operating loss or if the corporation is a small business investment company) .....

4. Dividends paid on certain preferred stock of public utilities (see instructions in case of net operating loss) .....

5. Western Hemisphere trade corporations (see instructions in case of net operating loss) .....

6. Total special deductions (enter here and on line 29(b), page 1) .....

## TAX COMPUTATION SCHEDULE

1. (a) Line 30, page 1 25,010.55 (b) plus line 1, Schedule I .....

Enter total here → 25,010.55

2. If amount of line 1 is:

(a) Not over \$25,000—Enter 30 percent of line 1 (32 percent if a consolidated return) .....

(b) Over \$25,000—Enter 52 percent of line 1 (54 percent if a consolidated return) .....

Subtract \$5,500, and enter difference .....

3. Adjustment for partially tax-exempt interest. Enter 30 percent of line 1 (b), but not in excess of 30 percent of line 1 .....

4. Normal tax and surtax (line 2 less line 3) .....

5. Income tax (line 4, or line 22 of separate Schedule D) .....

6. Credit allowed a domestic corporation for income taxes paid to a foreign country or United States possession (attach Form 1118) .....

7. Balance of income tax (line 5 less line 6) .....

8. Tax under section 541 of the Internal Revenue Code (from Schedule 1120 PH) .....

9. Total income tax (line 7 plus line 8). Enter here and on line 31, page 1 .....

H. Date incorporated 8/5/49

- I. (1) Did the corporation at the end of the taxable year own directly or indirectly 50 percent or more of the voting stock of a domestic corporation? Yes ☐ No ☒
- (2) Did any corporation, individual, partnership, trust, or association at the end of the taxable year own directly or indirectly 50 percent or more of the corporation's voting stock? Yes ☒ No ☐
- (For rules of attribution, see section 267 (c).)

If the answer to (1) or (2) is "Yes," attach separate schedule showing:

- (a) name and address: See Schedule E
- (b) percentage owned: 8/5/49
- (c) date acquired; and 8/5/49
- (d) the District Director's office in which the income tax return of such organization for the last taxable year was filed. Buffalo, N.Y.

If the answer to (1) above is "Yes," include the income (or loss) from line 30, page 1, Form 1120 of such corporation for the taxable year ending with or within your taxable year.

If the answer to (2) above is "Yes," include (a) the amount of cash or stock dividends paid to such individual or organization and (b) identify form of organization. None

J. Were Forms 1096 and 1099 filed for the calendar year 1962 in connection with:

Taxable dividends .....

Other payments .....

K. Did you have any contracts or subcontracts subject to the Renegotiation Act of 1951 .....

If "Yes," see Inst. K. Enter amount here: .....

L. Did you at any time during the year own directly or indirectly any stock of a foreign corporation? Yes ☐ No ☒

If "Yes," attach statement as required by Instruction N.

M. Amount of income (or deficit) for: 1959 25,816.18  
1960 30,812.53 1961 24,472.34N. If a cooperative association, check type:  
(1) ☐ farmers' purchasing or marketing; (2) ☐ consumers or (3) ☐ other.

O. Did you claim a deduction for expenses connected with: (If answer to any question is "Yes," check applicable boxes within that question.)

(1) A hunting lodge ☐, working ranch or farm ☐, fishing camp ☐, resort property ☐, pleasure boat or yacht ☐, or other similar facility ☐? (Other than where the operation of the facility was the principal business.) Yes ☐ No ☒(2) The leasing, renting, or ownership of a hotel, room or suite ☐, apartment ☐, or other dwelling ☐, which was used by customers or employees or members of their families? (Other than use by employees while in business travel status.) Yes ☐ No ☒(3) The attendance of your employees' families at conventions or business meetings? Yes ☐ No ☒(4) Vacations for employees or members of their families? (Other than vacation pay reported on Form W-2.) Yes ☐ No ☒

P. Refer to instructions and state the:

Principal business activity Fuel Oil DistributorsPrincipal product or service Fuel Oil



## Schedule H.—SUMMARY OF DEPRECIATION AND AMORTIZATION SCHEDULES

DEPRECIATION	Under Rev. Proc. 62-21	Other	AMORTIZATION
1. Straight line method.....		8,410.45	1. Emergency facilities.....
2. Declining balance method.....			2. Research or experimental.....
3. Sum of the years-digits method.....			3. Exploration and development.....
4. Based on units of production.....			4. Organizational.....
5. Addl. 1st year (Sec. 179).....		2,000.00	5. Trademark and trade name.....
6. Other (specify).....			6. Other (specify).....
7. Total depreciation claimed.....		10,410.45	7. Total amortization claimed.....

## Schedule I.—SPECIAL DEDUCTIONS

- Dividends-received: (a) 85 percent of column 2, Schedule C.....  
(b) 62.115 percent of column 3, Schedule C.....  
(c) 85 percent of dividends received from certain foreign corporations.....
- Total dividends-received deductions (sum of lines 1(a), (b), and (c) but not to exceed 85 percent of the excess of line 28, page 1 over line 4 of this schedule). (The 85 percent limitation does not apply to a year in which a net operating loss occurs or if the corporation is a small business investment company.).....
- Dividends paid on certain preferred stock of public utilities (see instructions in case of net operating loss).....
- Western Hemisphere trade corporations (not allowable in year of net operating loss).....
- Total special deductions (enter here and on line 29(b), page 1).....

## TAX COMPUTATION SCHEDULE

- Taxable income (line 30, page 1).....
- If amount of line 1 is:  
(a) Not over \$25,000—Enter 30 percent of line 1 (32 percent if a consolidated return).....  
(b) Over \$25,000—Enter 52 percent of line 1 (54 percent if a consolidated return).....  
Subtract \$5,500, and enter difference..... 5,500.00
- Income tax (line 2, or line 22 of separate Schedule D, whichever is lesser).....
- Foreign tax credit (attach Form 1118).....
- Balance (line 3 less line 4).....
- Investment credit (attach Form 3468).....
- Balance of income tax (line 5 less line 6).....
- Tax under section 541 of the Internal Revenue Code (from Schedule 1120 PH).....
- Tax from recomputing prior year investment credit (attach statement).....
- Total tax (sum of lines 7, 8 and 9). Enter here and on line 31, page 1.....
- Date incorporated August 3, 1949

- I. (1) Did the corporation at the end of the taxable year own directly or indirectly 50 percent or more of the voting stock of a domestic corporation?..... Yes ☐ No ☒
- (2) Did any corporation, individual, partnership, trust, or association at the end of the taxable year own directly or indirectly 50 percent or more of the corporation's voting stock?..... Yes ☒ No ☐  
(For rules of attribution, see section 267 (c).)

If the answer to (1) or (2) is "Yes," attach separate schedule showing:

- (a) name, address, and employer identification no.;  
(b) percentage owned; See Schedule B  
(c) date acquired; and 8/3/49  
(d) the District Director's office in which the income tax return of such organization for the last taxable year was filed. Buffalo, N.Y.

If the answer to (1) above is "Yes," include the income (or loss) from line 30, page 1, Form 1120 of such corporation for the taxable year ending with or within your taxable year.

If the answer to (2) above is "Yes," include (a) the amount of cash or stock dividends paid to such individual or organization and (b) identify form of organization. None

- J. Were Forms 1096 and 1099 filed for the calendar year 1963 in connection with:

Taxable dividends..... Yes ☐ No ☒

Other payments..... Yes ☐ No ☒

- K. Did you have any contracts or subcontracts subject to the Renegotiation Act of 1951..... Yes ☐ No ☒

If "Yes," see Inst. K. Enter amount here.....

- L. Did you at any time during the year own directly or indirectly any stock of a foreign corporation?..... Yes ☐ No ☒  
If "Yes," attach statement as required by Instruction N.

M. Amount of income (or deficit) for: 1960.. 30,812.53  
1961.. 24,472.34 1962.. 25,010.53

- N. If a cooperative association, check type:

(1) ☐ farmers' purchasing or marketing; (2) ☐ consumers', or (3) ☐ other.

- O. Did you claim a deduction for expenses connected with: (If answer to any question is "Yes," check applicable boxes within that question.)

(1) A hunting lodge ☐, working ranch or farm ☐, fishing camp ☐, resort property ☐, pleasure boat or yacht ☐, or other similar facility ☐? (Other than where the operation of the facility was the principal business.) Yes ☐ No ☒

(2) The leasing, renting, or ownership of a hotel room or suite ☐, apartment ☐, or other dwelling ☐, which was used by customers or employees or members of their families? (Other than use by employees while in business travel status.) Yes ☐ No ☒

(3) The attendance of your employees' families at conventions or business meetings? Yes ☐ No ☒

(4) Vacations for employees or members of their families? (Other than vacation pay reported on Form W-2.) Yes ☐ No ☒

- P. Refer to instructions and state the Principal business activity Fuel Oil Distributor

Principal product or service Fuel Oil